



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

# COLUMBIA LAW REVIEW.

---

VOL. I.

JANUARY, 1901.

No. 1.

---

## THE BURDEN OF LOSS AS AN INCIDENT OF THE RIGHT TO THE SPECIFIC PER- FORMANCE OF A CONTRACT.\*

THE effect of the destruction in whole or in part of the subject-matter of an executory bilateral contract, by the terms of which real property is to be conveyed and money paid therefor, either concurrently with, or subsequent to, the execution of a deed of conveyance, is to relieve the vendee from any obligation at law.<sup>1</sup> Nor is it possible to reach any other result, since the only enforceable right acquired at law by the vendee is a right to recover damages for a breach of the contract. The vendor remains the owner of the property with all the incidents of ownership. Since a vendee has at law no ownership of the property and no power of control over the same, a court of law cannot, for the purpose of throwing the loss upon him, treat him as if he were the owner. The same result must be reached in equity when because of the terms of the contract the element of control, on the part of the vendee, is equally wanting in equity. Therefore, in a contract where the vendor is at liberty to sell or not as he pleases, the vendee, having no rights, should not be subjected to any burdens. It is for this reason that the result reached in *Goldman v. Rosenberg*<sup>2</sup> should be followed in all jurisdictions. In that

---

\* The writer regrets that circumstances, beyond his control, have compelled him to confine the citation of cases almost exclusively to those found in his *Cases on Equity Jurisdiction*.

<sup>1</sup> *Wells v. Calnan*, 107 Mass., 514.

<sup>2</sup> 116 N. Y., 78.

case, which was an action for an accounting between co-partners, it appeared that the defendants contributed, as a part of the capital stock, certain improved real estate, which they agreed to take back on the dissolution of the firm at the valuation at which it had been taken by the firm. The plaintiff, on the dissolution of the firm, sought to compel the defendants, notwithstanding the destruction of the buildings on the land, to take back the property at the valuation aforesaid, less the amount of the insurance collected by the firm. It was held that the firm must bear the loss. The contract for repurchase was clearly not for the benefit of the defendants but for the benefit of the firm. The defendants bound themselves to take; the firm did not bind itself to sell. The property was, therefore, to be treated as firm assets, subject to all the vicissitudes of the firm business. "The defendants, said the court,<sup>1</sup> were not the owners, legal or equitable; they did not have an insurable interest in the premises." To have thrown the burden of ownership upon one who, at the time of the destruction of the buildings, had none of the benefits of ownership, either at law or in equity, would have been manifestly unjust.

Of course, if a vendee has not obligated himself to take, but has simply purchased the privilege of demanding a conveyance, neither law nor equity can convert his privilege into a duty and compel him to take. The question, therefore, of his bearing the loss, consequent upon his right to demand specific performance, can never arise.

Does the fact that equity will decree specific performance of a contract, whereby the one party has contracted to convey at a future day and the other to accept a conveyance, and to pay therefor at the time of the conveyance, or at some subsequent time, justify a court of equity in throwing upon the vendee a loss which at law will fall upon the vendor? What equity should do in these circumstances would seem to depend largely upon what equity has done in cases not presenting for consideration this particular question. If the rights of the parties to such a contract have been determined in equity on principles drawn from the law of trusts, rather than on the principles found in the

---

<sup>1</sup> 116 N. Y., 78, 85.

law of contracts, then a reason may be found why a result should be reached in the case supposed differing from that reached at law. It is submitted that the principles of the law of trusts, not those of contract, have been invoked to reach the following results:

- I. The vendee can call for a conveyance of the property from a donee, or purchaser with notice.<sup>1</sup>
- II. The interest of the vendee can be assigned or devised.<sup>2</sup>
- III. In the event of the vendee's death, his heir, not his personal representative, is entitled to a conveyance.<sup>3</sup>
- IV. Under a devise by the vendee of his real estate, the interest of the vendee passes.<sup>4</sup>
- V. In jurisdictions where a wife is given dower in equitable estates, the widow of the vendee is entitled to dower.<sup>5</sup>
- VI. The vendee has a right to require husbandlike conduct of the vendor in the management of the estate.<sup>6</sup>
- VII. The vendee is chargeable with the costs of improvements made by the vendor under compulsion of law.<sup>7</sup>
- VIII. The vendee is chargeable with taxes paid by the vendor beyond the value of the usufruct.<sup>8</sup>
- IX. An estate which a vendor has contracted to sell will pass under a will to a devisee to whom the vendor has devised the estates held in trust by him.<sup>9</sup>
- X. A court of equity will not allow a widow to claim, as against the vendee, dower in land which the husband had, before his marriage, contracted to sell.<sup>10</sup>

---

<sup>1</sup> *Daniels v. Davison*, 17 Ves., 433; *Lovejoy v. Potter*, 60 Mich., 95; *Moyer v. Hinman*, 13 N. Y., 180.

<sup>2</sup> *Townsend v. Champenowne*, 9 Price, 130; *Buck v. Buck*, 11 Paige, 170.

<sup>3</sup> *Langford v. Pitt*, 2 P. Wms., 629.

<sup>4</sup> *Townsend v. Champenowne*, 9 Price, 130; *Buck v. Buck*, 11 Paige, 337.

<sup>5</sup> *Bailey v. Duncan*, 4 Mon., 256.

<sup>6</sup> *Foster v. Deacon*, 3 Madd., 394; *Phillips v. Silvester*, L. R., 8 Ch. Ap. 173; *Clarke v. Ramuz*, L. R., 2 Q. B. (1891), 456.

<sup>7</sup> *King v. Ruckman*, 24 N. J. Eq., 556.

<sup>8</sup> *King v. Ruckman*, 24 N. J. Eq., 556.

<sup>9</sup> *Lysaght v. Edwards*, L. R., 2 Ch. Div., 499.

<sup>10</sup> *Oldham v. Sale*, 1 B. Mon., 76.

XI. The property is no longer liable for the debts of the vendor.<sup>1</sup>

Subject, apparently, to one exception only, the vendor has been treated by a court of equity as holding the title to the property as security for the payment of the purchase money, and his position has been likened to that of a mortgagee.<sup>2</sup> The one right lacking to make the position of the vendor and vendee in equity entirely analogous to the position occupied in equity by mortgagor and mortgagee, is the inability of the vendee to demand an accounting of rents and profits until the vendor is in default under his contract.

Equity has likened the interest of the vendee to that of the *cestui que trust* or mortgagee, for the reason that his claim, like theirs, is a claim *in personam* with reference to a specific *res* specifically enforceable in equity. As the jurisdiction of equity is purely *in personam*, to speak of the vendee, *cestui que trust*, or mortgagor as the owner in equity of the property, is to speak figuratively. The *cestui que trust* is given the rents and profits because of the fact that it would be manifestly unjust that a party having no beneficial interest in the property should enjoy the property at the expense of the beneficial owner. In the case of a mortgagor he is clearly entitled to the rents and profits, for the reason that the property is held by the mortgagee simply as security for a debt, and when he has received that, to secure the payment of which the title has been vested in him, it would be manifestly inequitable to allow him to retain the rents and profits, thereby enriching himself at the expense of the mortgagor. While the court of equity has likened the interest of the vendor to that of a mortgagee, for the purpose of working out certain just results, it is impossible for the court to confer upon the vendor a right to demand of the vendee a sum of money in excess of that which he has agreed to pay. The fact that the vendor has a *res* to which the vendee is in equity entitled, enables the court to liken the vendor's position to that of a mortgagee, to the extent that it is in interest of justice to do so. As the vendee holds no *res* for the ven-

---

<sup>1</sup> Moyer v. Hinman, 13 N. Y., 180.

<sup>2</sup> Lysaght v. Edwards, L. R., 2 Ch. Div., 499, 506.

dor, having given simply a promise in terms acceptable to the vendor, the sum agreed to be paid must be the limit of the amount of which equity can enforce payment. To compel the vendor to account for rents and profits, because of his possession during the time when he has no right to call upon the vendee for payment of interest, would be to give the vendee the enjoyment of both the purchase money and the real estate, and this would be manifestly unjust. To allow the vendor to retain the rents and profits, so long as he has no right to interest on the purchase-money, is therefore a necessity.

It is submitted that in these circumstances the absence of a right to demand rents and profits is no reason why a vendor should bear the loss, if but for the absence of that right the loss should be thrown on the vendee.

In the opinion of at least one writer,<sup>1</sup> the question as to the person upon whom the burden of loss should be thrown in the case under consideration, is to be determined by the fact of possession. If the vendor retains the possession he must bear the loss. If the vendee is given possession, although the vendor retains the title, the vendee must suffer the loss. The reason assigned for this distinction is that by giving possession to the vendee an intention has been indicated to hold the title simply as a security for the payment of a debt, and the transaction should then be regarded, by a court of equity, as if the deed of conveyance had been executed and a purchase-money mortgage given. It is submitted that if the court of equity is justified in treating the title as if it had passed in a case where the parties have manifested an intention that the title be retained simply as security, then the same result should be reached when that court, in the absence of any indication of the intention of the parties to the contract has, because of the rights conferred upon the vendee, treated the vendor as holding the property simply as security.

Another writer,<sup>2</sup> who supports the doctrine that the vendor must bear the loss in the case supposed, concedes that if the contract has been performed by the vendee by the payment of the purchase money the vendee must bear the

---

<sup>1</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 120.

<sup>2</sup> Langdell, *A Brief Survey of Equity Jurisdiction*, 2 H. L. R., 241, n. 1.

loss consequent upon the destruction of the property prior to the time when he is entitled to a conveyance. The reason assigned by him is that, by the payment of the money, the vendor has become a trustee for the vendee. It is not probable that the learned writer would contend that the vendor in that case is a real trustee as distinguished from a constructive trustee. At law the relation was in its inception a contractual one, and did not cease to be such by the payment of the purchase money. All that the vendor has done is to receive the purchase-money in accordance with the terms of the contract. The result is that the vendee has an absolute right, where before his right was conditional. But it is the power of control, and the rights conferred upon the vendee on the making of the contract, that gives him his standing in equity, not the simple payment of money. But why should a vendee suffer a loss who has paid for that which he has not received, when if his contract had not required a payment in advance, he could have refused to pay, because of the impossibility of the vendor giving him that for which he was to pay? In point of equity, a man who is paid for that which the other party has contracted to give, and cannot give, would seem to be in at least as good a position as one who has failed to pay for that which he has not received. If it is inequitable to compel a vendee to pay for that which the vendor cannot convey, it would seem equally inequitable to permit the vendor to keep that which has been given to him in exchange for something which he cannot give.

In each case, if the question is approached as a question of contract, pure and simple, something is being given, or has been given, for nothing. In either case, if it is to be approached as a question of trust, the equity would seem to arise, not from the payment of the purchase-money, but from the equitable right acquired because of the doctrine of specific performance of contracts.

The same writer concedes<sup>1</sup> that if the loss happens after the time for the performance of the contract, and at a time when, barring the loss in question, the vendor would be entitled to specific performance, though the vendor's rights at law are gone, the loss must fall on the vendee. An illus-

---

<sup>1</sup> Langdell, *A Brief Survey of Equity Jurisdiction*. 1 H. L. R., 374-75.

tration of such a case would seem to be the case where a vendor is in default as to the time of performance, but in circumstances when, notwithstanding his default, he can enforce specific performance. Clearly, in this case, a court of equity is enforcing a right not legal in its character, as no right exists at law, and it seems difficult to see why a vendee, not in default, should have the loss thrown upon him because the loss happened after the time for the performance, when had the loss happened before such a time no such liability would have been incurred.

The explanation given for this result is that "when performance of a contract is enforced in equity, the performance is held to relate back to the time fixed by the contract for its performance; and hence, if performance be enforced in the case supposed, equity will regard the land as having belonged to the vendee when the loss happened." In assigning this reason in justification of such a result, the writer seems to have lost sight of the fact that the doctrine of relation is a fiction that can only be invoked in order to promote justice, *i. e.*, in order to prevent some injustice or some inconvenience that would otherwise arise.<sup>1</sup>

If, then, justice requires the doctrine of relation to be invoked, in order that the loss may be thrown upon the vendee, it must be for the reason that it would be unjust not to throw the loss on him. But why should a party, not in default under his contract, bear a loss because it happens after the time for performance, when he should not have been compelled to bear the loss if it had happened prior to that time?

The same writer<sup>2</sup> urges as an objection to throwing the loss upon the vendee in the case under consideration, that, to do so, it is necessary to have the performance relate back to the time when the contract was made, and that such relation cannot be justified, as it was the intention of the parties that the conveyance should be executed on a day subsequent to the making of the contract and to the time of loss. This objection is undoubtedly fatal if the doctrine of relation must be invoked. But it is submitted that, in view of the position taken in equity as to the vendee's rights,

---

<sup>1</sup> Langdell, *Contracts*, 2 Ed., 8.

<sup>2</sup> Langdell, *A Brief Survey of Equity Jurisdiction*, 1 H. L. R., 376.



there is no greater reason for invoking such a doctrine in the case supposed, than there would be to invoke the doctrine of relation in the case of a mortgagor or mortgagee, if the question came up as to whether the mortgagor or the mortgagee should bear the loss, consequent upon the destruction of property, while in the possession of the mortgagee. If the loss is to be thrown upon the vendee it is because he is in equity substantially the owner of the property, and, as a consequence, justice requires that having the benefits he should bear the burden of ownership. It is because of his equitable, not his legal, ownership that the vendee should bear the loss.

It has also been suggested that many of the results reached in this class of cases depend upon the doctrine of equitable conversion.<sup>1</sup> It is said that equitable conversion is a doctrine resorted to by a court of equity to give effect to the intention of the owner of property.<sup>2</sup> In other words, that the doctrine of equitable conversion depends not upon "the contract *qua* contract \* \* \* but the contract as expressing the intention of one of the parties to it with reference to a matter within his exclusive control," and, therefore, this doctrine should not be resorted to, save for the purpose of determining the rights of the representatives of a party to a contract as between themselves. The phrase *equitable conversion*, it is submitted, is a form of speech used to express a result which has been reached in a certain class of cases in the interest of justice. It does not lead to, but represents, results reached. It is just in a given case that realty should be treated *as if it were* personalty, or personalty *as if it were* realty, and a court of equity so treats it. The reason why it is just will vary with the facts presented. It may be because of the intention of a deceased owner of property, or for other reasons.<sup>3</sup> It seems quite unnecessary to resort to this doctrine to justify the results that have been reached in considering the rights and liabilities arising in equity when a contract has been made for the purchase and sale of real estate.

When A contracts to sell real estate to B, and B con-

---

<sup>1</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 117.

<sup>2</sup> Langdell, *A Brief Survey of Equity Jurisdiction*, 1 H. L. R., 378-380.

<sup>3</sup> *Lysaght v. Edwards*, L. R., 2 Ch. Div., 499, 507.

tracts to buy, A has acquired a right and assumed an obligation. He owns real estate which a court of equity will compel him to convey to B. If he dies the land descends to his heir for the reason that it is real estate and not personalty. When a court of equity compels the heir to hold for the vendee, it is because a donee of property cannot occupy a better position with reference to the property than the donor, and not because it is to be treated as personalty. Indeed, it is because equity recognizes that the property is real estate, that the heir of the vendee, not the personal representative, is entitled to call for a conveyance. When equity says that the widow of a vendor, who was under a contract to sell the estate at the time of his marriage, will not be allowed to claim dower, it is not because equity regards the property as personalty, but because of the trust obligation relating to the property. The rights acquired by the vendor are personalty, and, as such, go to his personal representatives on his death. A result concurred in by equity.

It has been urged, as an objection to the doctrine, that the loss should be thrown upon the vendee, that, in a doubtful case, to let a loss lie where it falls saves litigation.<sup>1</sup> It is undoubtedly true that if a court cannot satisfy itself, that a plaintiff is entitled to the relief which he seeks, it should not give a decree in his favor. To do so would be manifestly unjust to a defendant against whom the court is not prepared to say the plaintiff has established a right. That the court should leave the loss where it falls, to save litigation, is a proposition which, standing alone, should not receive assent, and is immaterial if the court is unable to say that the plaintiff has established a right.

It has been further suggested that it is wiser to have the party in possession of the property care for it at his peril; that to throw the loss in such a case on the vendee is to tempt the vendor to be wanting in the exercise of that care which he would otherwise use.<sup>2</sup>

In considering this objection, it must be remembered that, if the loss is occasioned by the negligence of the vendor, and that fact can be established, the loss will be borne by him, and not by the vendee. In view of this fact,

---

<sup>1</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 122.

<sup>2</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 122.

unless the justice of the case requires the vendee to bear the loss, the necessity of throwing the loss upon the vendor in order to insure proper care on his part does not seem so great as to require injustice to be done to a careful vendor. That negligence may be a difficult thing to prove is hardly a reason for throwing a loss upon a man who, in the absence of negligence, ought not, in point of justice, to be held liable.

The practical advantage, whatever it may be, of throwing the loss on the vendor to prevent the subrogation of an insurer to the rights of a vendor against a vendee,<sup>1</sup> does not seem so great as to require injustice to be done the vendor.

It has been urged that the vendee should not be treated as enjoying the *jus disponendi*,<sup>2</sup> unless he can, under the recording acts, give constructive notice of his equitable ownership. The reason assigned for this position is that, in the absence of such a right, the vendor has it in his power to deprive the vendee of his interest by conveying the property to an innocent purchaser. One would hardly think of requiring the trustee of an express trust to indemnify the *cestui que trust* against the loss of trust property in a case where the trustee has it in his power to defeat the trust by conveying to an innocent purchaser for value, and where, therefore, a dishonest trustee might profit at the expense of a *cestui que trust*. Why, then, should an honest vendor suffer a loss, because, had he been dishonest, he might have defrauded the vendee of his rights, leaving him only a claim for damages?

Rightly or wrongly—rightly, the writer thinks—the vendee in the case under consideration has been given in equity rights analogous to those of the *cestui que trust*, with substantially the benefits of equitable ownership. As a necessary consequence, in the opinion of the writer, he must bear, as one of the burdens of ownership, the loss involved in the destruction of property, in whole or in part, without the fault of the vendor. Such is the result reached in England and in the majority of the jurisdictions in this country.<sup>3</sup>

WILLIAM A. KEENER.

---

<sup>1</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 122.

<sup>2</sup> Williston, *The Risk of Loss*, 9 H. L. R., 106, 119.

<sup>3</sup> *Paine v. Miller*, 6 Ves., 349; *Costellain v. Preston*, L. R., 11 Q. B. D., 380; *Smith v. Hayles*, 12 Vict. L. R., 237; *Johnston v. Jones*, 12 B. Mon., 326; *Brewer v. Hubert*, 30 Md., 301. See, however, *contra* *Gould v. Murch*, 70 Me., 288; *Thompson v. Gould*, 20 Pick., 134. The decision in *Wells v. Calnan*, 107 Mass., 514, is not in point as the action in that case was at law for a breach of contract in not accepting a conveyance.